APPEAL NO. 171429
FILED AUGUST 15, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 3, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on October 17, 2016; and that the claimant's impairment rating (IR) is 14% as determined by (Dr. B), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division).

The claimant appealed the hearing officer's determination arguing that Dr. B's assignment of IR was not in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), and further requesting that additional evidence offered for the first time on appeal be considered. The respondent (carrier) responded, urging affirmance.

The hearing officer's determination that the claimant reached MMI on October 17, 2016, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that the statutory date of MMI is October 17, 2016. The claimant, a paramedic, testified that he was injured lifting a heavy patient. In evidence is a copy of a Benefit Dispute Agreement (DWC-24) dated December 12, 2016, evidencing the agreement of the parties that the compensable injury extends to left shoulder sprain/strain, lumbar sprain/strain, L4-5 disc herniation with lumbar radiculopathy, left chest wall strain, L3-4 disc bulge and left ankle calcaneus fracture but does not extend to cervical pain, L3-4 spinal stenosis, thoracic pain, T12-L3 Schmorl's nodes along with spinal stenosis and narrowing, and degenerative disc disease at T12-L5.

NEWLY DISCOVERED EVIDENCE

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; *Black v. Wills*, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel

considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 051405, decided August 9, 2005. The claimant submits for the first time on appeal the Report of Medical Evaluation (DWC-69) dated May 8, 2017, prepared by (Dr. K), a referral of the treating doctor, following a post-designated doctor examination on the same date. Also submitted was correspondence pertaining to such examination. We do not agree that the documents submitted by the claimant for the first time on appeal meet the requirements for newly discovered evidence. Indeed, the claimant's request for a continuance to obtain a post-designated doctor evaluation urged at the May 3, 2017, CCH was denied by the hearing officer because continuance of the previous February 9, 2017, CCH setting had been granted nearly three months prior to allow the claimant to obtain an alternate certification. The evaluation and report from Dr. K could reasonably have been obtained prior to the CCH. Further, it is noted that Dr. K provided an IR for a condition agreed by the parties not to be part of the compensable injury. Such report, therefore, would not result in a different decision. Therefore, the documents attached to the claimant's appeal were not considered by the Appeals Panel.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Dr. B examined the claimant on January 20, 2017, and in a DWC-69 dated January 23, 2017, certified MMI on the statutory date of October 17, 2016, and assigned an IR of 14%, comprised of 10% pursuant to Lumbosacral Diagnosis-Related Estimate (DRE) Category III for lumbar radiculopathy, atrophy and loss of reflexes together with 4% attributable to loss of motion of the left ankle. Dr. B's IR cannot be adopted, however, because he also evaluated and assigned an IR of 0% under DRE Category I for a thoracic spine injury, which the parties had expressly agreed was not part of the (date of injury), compensable injury. Furthermore, Dr. B failed to evaluate a left chest wall strain, a condition which the parties agreed was a part of the

compensable injury. For such reason, the hearing officer's decision that the claimant's IR is 14% as determined by Dr. B is reversed.

There is no other certification of MMI/IR in evidence. Because there is no certification in evidence that can be adopted, we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's IR for the (date of injury), compensable injury as of the October 17, 2016, date of MMI.

If Dr. B is still qualified and available to serve as the designated doctor, the hearing officer is to advise Dr. B that the date of MMI is October 17, 2016, and request that Dr. B examine the claimant and assign an IR as of the date of MMI for the compensable injury in accordance with Rule 130.1(c)(3) and the AMA Guides.

The hearing officer will further advise the designated doctor that the compensable injury of (date of injury), extends to left shoulder sprain/strain, lumbar sprain/strain, L4-5 disc herniation with lumbar radiculopathy, left chest wall strain, L3-4 disc bulge and left ankle calcaneus fracture but does not extend to cervical pain, L3-4 spinal stenosis, thoracic pain, T12-L3 Schmorl's nodes along with spinal stenosis and narrowing, and degenerative disc disease at T12-L5.

The parties are to be provided with the designated doctor's new IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on IR consistent with the evidence and this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

K. Eugene Kraft
Appeals Judge

CONCUR

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge